



University of Kentucky
UKnowledge

1970-1979

Briefs

3-1-1976

Commonwealth of Kentucky, ex rel, Department for Natural Resources and Environmental Protection and Robert F. Stephens, Attorney General, on behalf of the Commonwealth of Kentucky v. Appeal from Order of Contempt Entered on November 3, 1975

Appellee's Brief 1975-SC-1177

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/ky_appeals_briefs70s

 Part of the [Courts Commons](#)

Repository Citation

1975-SC-1177, Appellee's Brief, "Commonwealth of Kentucky, ex rel, Department for Natural Resources and Environmental Protection and Robert F. Stephens, Attorney General, on behalf of the Commonwealth of Kentucky v. Appeal from Order of Contempt Entered on November 3, 1975" (1976). 1970-1979. 387.

https://uknowledge.uky.edu/ky_appeals_briefs70s/387

This Brief is brought to you for free and open access by the Briefs at UKnowledge. It has been accepted for inclusion in 1970-1979 by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.



KYSC1975-SC-1177-02

{AD33CAC9-F9A6-4276-BC36-A50E6F87038A}

{135167}{54-131008:103712}{030176}

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 75-1177

COMMONWEALTH OF KENTUCKY, ex rel
DEPARTMENT FOR NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION AND ROBERT
F. STEPHENS, ATTORNEY GENERAL, on behalf of
the COMMONWEALTH OF KENTUCKY... APPELLANTS,

VS:

MORRIS STEPHENS, TOMBSTONE JUNCTION
ENTERPRISES, KENTUCKY HIGHWAY 90
PARKERS LAKE, KENTUCKY, APPELLEES.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SQUIRE N. WILLIAMS, JR., JUDGE

BRIEF FOR APPELLEES
MORRIS STEPHENS AND
TOMBSTONE JUNCTION

FILED

HOMER W. RAMSEY
Whitley City, Kentucky 42653

MAR 1 1976

and

J. B. JOHNSON, SR.
Williamsburg, Kentucky 40769
MARTHA LAYNE COLLINS
CLERK
SUPREME COURT *Attorneys for Appellees*

The undersigned hereby certifies that the herein BRIEF FOR APPELLEES was served by mailing true copies hereof, postage prepaid, on the _____ day of February, 1976, to the Honorable R. Lee Armbruster, Special Assistant Attorney General, 5th Floor, Capital Plaza, Frankfort, Kentucky 40601, Attorney for Appellants, and to the Honorable Squire N. Williams, Jr., Circuit Judge, Franklin County Court House, Frankfort, Kentucky 40601.



Homer W. Ramsey
Of Counsel for Appellees

TABLE OF CONTENTS

	Page
STATEMENT OF THE QUESTIONS PRESENTED	1
COUNTER-STATEMENT OF THE CASE	2-3
AREA DESCRIBED	4-6
ARGUMENT	6-10
I. APPELLANTS OFF THE TRACK.	6-8
II. BOTH PARTIES ENTITLED TO EQUITY.	8
III. NEITHER IS WRIT OF PROHIBITION AVAIL- ABLE.....	8-9
IV. JUDGMENT FOR CONTEMPT MUST BE OBEYED.....	9-10
CONCLUSION	11-12

AUTHORITIES DISCUSSED

	Page
KRS 146.280 expressly provides for compensation to the landowner for any interest taken.....	6
I. APPELLANTS OFF THE THE TRACK.	6-8
KRS 146.280.....	6, 7
The legislative intent to compensate is clearly shown in the entire act, 146.200-920.....	7
II. BOTH PARTIES ARE ENTITLED TO EQUITY.	8
<i>Gregory v. Crain,</i> 163 S.W. 2d 289, 291 Ky. 194	8
III. A WRIT OF PROHIBITION IS NOT AVAILABLE.	8-9
<i>Lawson Stone Corp. v. Hays, Judge,</i> Ky., 429 S.W. 2d 413	8
<i>Kindt v. Murphy, Judge,</i> Ky., 227 S.W. 2d 895	8
Clay, Ky. Pract. 65.06, Comment 3, Page 286.....	9
Contempt May Issue Against A State Agency.	9
<i>Wallace v. Sowards,</i> Ky., 231 S.W. 2d 10	9
KRS 146.280	9
IV. JUDGMENT FOR CONTEMPT MUST BE OBEYED.	9-10

AUTHORITIES DISCUSSED (Continued)

	Page
<i>Kerr v. Board of Dental Examiners,</i> Ky., 469 S.W. 2d 545	9
Civil Contempt Can't Be Superseded.	10
<i>Hale v. Candarc Trans. Co. of Ky.,</i> Ky., 454 S.W. 2d 679	10
CR 65.05, 65.08	10

SUPREME COURT OF KENTUCKY

File No. 75-1177

**COMMONWEALTH OF KENTUCKY, ex rel
DEPARTMENT FOR NATURAL RESOURCES AND
ENVIRONMENTAL PROTECTION AND ROBERT
F. STEPHENS, ATTORNEY GENERAL, on behalf of
the COMMONWEALTH OF KENTUCKY... APPELLANTS,**

VS:

**MORRIS STEPHENS, TOMBSTONE JUNCTION
ENTERPRISES, KENTUCKY HIGHWAY 90
PARKERS LAKE, KENTUCKY, APPELLEES.**

**APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SQUIRE N. WILLIAMS, JR., JUDGE**

**BRIEF FOR APPELLEES
MORRIS STEPHENS AND
TOMBSTONE JUNCTION**

STATEMENT OF THE QUESTIONS PRESENTED

- I. DOES THE CIRCUIT COURT HAVE AUTHORITY
TO ENFORCE AN ORDER DIRECTING THE
ADMINISTRATIVE AGENTS OF THE STATE OF
KENTUCKY TO COMPENSATE PROPERTY OWNERS
FOR LAND TAKEN BY THEM?**
- II. ARE THE OFFICERS OF NATURAL RESOURCES
IMMUNE FROM OBEYING THE U. S. AND STATE
CONSTITUTION, THE KENTUCKY LEGISLATURE
AND THE COURTS?**

COUNTER-STATEMENT OF THE CASE

Dates to Remember—The Wild Rivers Act became effective June 16, 1972. Immediately thereafter the appellees, property owner, began by visits to the department, telephone calls and letters to get information what and how much of their property just above Cumberland Falls that the Department wanted. They got a “don’t know” answer, except the attorney general wrote a letter quoting some paragraphs of the Act—but not mentioning the “*acquire*” and “*condemn*” provisions favorable to the property owner. Appellees own about 300 acres—some of it beyond the 2500 foot maximum.

After waiting until late October, 1974, and not using any of the land—appellees started to make an additional improvement for their business. This necessitated leveling off an area that had been previously *attempted* to be taken by the State Park Commission. See *Ky. State Park v. Stephens*, Ky., 407 S.W. 2d 711.

On November 1, 1974, a temporary restraining order was issued against the appellees from “any use” by KRS 146.290, “within the exterior boundaries of the stream”.

On November 9, 1974, property owners filed motions to dissolve restraining order and their motions setting up a taking by unconstitutional

interpretations of the Act and procedure. These motions were heard on December 10, 1974. The Court treated them as a motion for summary judgment, overruled the motion to dissolve and entered a temporary injunction in favor of the Commonwealth.

On the 21st day of June, 1975, the Circuit entered a written opinion holding the Act constitutional but further holding that the Act, KRS 146.280 mandated compensation and directed the plaintiffs to "*forthwith initiate proceedings*" and *stated that the defendants "may apply to the Court for such relief as justice may require if the Commonwealth does not take the action required by this judgment."*

On August 23, 1975, judgment was entered in conformity with the opinion. The Court used the word "*simultaneously*" instead of the word "*forthwith*" in the opinion. There is a distinction in time of the meanings: "*Forthwith*" means immediately. "*Simultaneously*" means at the same time. Anyway, appellants did neither.

On September 25, the property owners filed motion to hold plaintiffs in contempt for their failure to comply with the injunctive order, Rule 65.06. The Court entered the order of contempt on November 3, 1975.

AREA DESCRIBED

It must be stated here that the area where the owners were working when restrained is in no sense a primitive or pristine area. Quite the opposite. It adjoins the old Campbell Hotel property. It was for a time used as hitching lot for the riding stable operated by the state, between it and the river there was a residence and cleared area for many years. There is adjoining it now two tourist courts, a chair lift and Tombstone Junction, an entertainment center. The old county road, one time the only public way to the Falls, runs all the way across it. This is and has been for years the most accessible and practical area to develop for the purpose of taking care of the needs, comforts and requirements of visitors and patrons of the Cumberland Falls area. The uncleared area does have valuable timber and coal.

Now, this does not fit into KRS 146.220, "denominated legislative intent." There, and we quote, ". . . to preserve for the future generations certain areas '*untrammelled*' by man and to preserve the unique '*primitive*' character of these streams in Kentucky." Now, this area where the work was going on is neither "*primitive*" or "*untrammelled*" by man. In point of fact, the writer of this brief has squirrel hunted over every acre of all the land in question and opossum and coon hunted a few times.

Then, in Section 146.230 it specifically says that "*The ownership not already acquired by the State shall be protected by acquisition of fee title or by scenic easements.*"

It is evident that the legislature did not have the *intent* from this language to disturb those areas that had been used over the years because, of course, they have been tramped on by man and they are not "*primitive.*"

Here the Court granted the injunction to plaintiffs, but said compensate the owners. For more than a year in briefs they have in substance by their action said, "No we'll take by injunction, but we won't pay." Is that not a complete defiance of the constitutional protections, Federal and State, in direct derogation of the "Wild Rivers Act"? How can responsible men be so disdainful of others' rights and scornful of orders of the Court?

Sec. 146.200, so often referred to in briefs, does not authorize the state to enjoin the use of land, rather it, and following sections, tell purpose, intent and the word "*acquire*" them follows in Sec. 146.230 and 146.280. After *acquired* it can be protected as outlined in 146.320. This is the injunction authorized. One has no right to *protect* until they *acquire*. The act gave them two years to get ready. It has now been nearly four years and no positive action on the enabling act have been initiated, except to get this wrongful injunction.

In fact responsible personnel, according to news stories, have said they did not intend to condemn, and had no money and no intention of purchasing. We invite them to be as candid with property owners and the courts as they have been to the press.

Let's look at that expressed inaction in the papers and the statute under which they operate. KRS 146.230 provides in part:

"Within the boundary area set forth—lands adjacent to these streams that are not already in state or public ownership shall be protected by *acquisition* by fee title or by scenic easement to the full extent necessary to preserve a true primitive environment in its pristine state."

ARGUMENT

I. APPELLANTS OFF THE TRACK.

As we see it, the appellants' brief takes the untenable position that the Commonwealth and its agents can take all the benefits of the "Wild Rivers Act" and *ignore* (defy would be a better word) those provisions requiring it to "*determine*", *have hearings* and *acquire* the property it wants or needs.

They have completely ignored KRS 146.280. KRS 146.280 reads: —"*Nothing in this act shall be construed to deprive a land owner of his property or any interest or right therein without compensation*"—

Then, later, the same sections says: "*The Commissioner shall not obtain an easement if the landowner objects thereto, but in such case, must obtain a fee title, with full compensation to the owner.*"

We inquire how could the legislative intent be more clearly expressed in any language requiring them to determine what they want and acquire by negotiation or condemnation?

Now, that quoted portion of the law KRS 146.280 annihilates the argument of the appellant that a "*taking*" must be shown, because:

1. The first portion protects the property owners right or "*any interest therein;*"

2. The second simply says if property owner objects, then they "*must*" condemn and pay "full compensation" in procuring the restraining and temporary injunction—just as they have ignored the Court's order—to *initiate proceedings to compensate*. They have the temerity to say:

"The appellants believe that the order of the Franklin Circuit Court clearly deals with the performance of some act at a future date." (Brief p. 9) How strange: The order (Judgment) simply says:—"They shall simultaneously with the request for injunctive relief, do it." Now, simultaneously is "at the same time—now."

They also quibble as to whether the judgment is one for "injunctive relief". Well, an injunction is all they have ever asked for, so how could it be anything else?

II. BOTH PARTIES ENTITLED TO EQUITY.

Our form of government is not founded upon the principle that "The King can do no wrong"—as is certainly impliedly contended by appellants. We have a state and federal constitution, a state legislature, that passes law within the constitutional framework. The position of appellants puts them above the law. Are they untouchable? Apparently, they contend so.

The strong arm of equity, to issue an injunction applies to both parties. The Court has an inherent right to grant relief upon condition. Both parties are entitled to equity. See *Gregory v. Crain*, 163 S.W. 2d 289, 291 Ky. 194.

III. NEITHER IS WRIT OF PROHIBITION AVAILABLE.

Lawson Stone Corporation v. Hays, Judge, Ky., 429 S.W. 2d 413.

In *Kindt v. Murphy*, Judge, Ky., 227 S.W. 2d 895, a witness refused to appear in obedience to a summons. He was adjudged to be in contempt. This

Court held that the contempt order could not be superseded.

See also Clay, Ky. Pract. 65.06, Comment 3 on Page 286.

CONTEMPT MAY ISSUE AGAINST A STATE AGENCY

In *Wallace v. Sowards*, Ky., 231 S.W. 2d 10, the division of game and fish was held to be in contempt for violation of an order in the Lewis Circuit Court. The question there involved the confiscation of a shotgun by the Department of fish and game. Here we have the confiscation (denial of use) of a large area of very valuable land. Surely, we are entitled to equal protection.

That procedure is directed to be followed in more detail, by KRS 146.280.

So the Commonwealth by express provision of the statute is directed to *acquire* or *condemn*.

IV. JUDGMENT FOR CONTEMPT MUST BE OBEYED.

Kerr v. Board of Dental Examiners, Ky., 469 S.W. 2d 545. This Court held "it is the duty of a party to obey the injunction, right or wrong," citing Rule 65.06.

That an appeal is pending does not stay the injunction order, *Supra*.

We will acquire when they have time? Under the Court's order they have delayed since the Opinion in June and Judgment August 23, 1974. The time fixed is long passed. So the time is now—not in eternity.

CIVIL CONTEMPT CAN'T BE SUPERSEDED

"A judgment for civil contempt may not be superseded," *Hale v. Candarc Trans. Co. of Ky., Ky.*, 454 S.W. 2d 679. This quotation is sufficient to destroy appellants argument that their appeal stayed the judgment of contempt.

From the above Opinion we quote (syllabus):

"Circuit Court enforces all restraining orders and injunctions except an injunction pending an appeal which may have been granted by Court of Appeals. CR 65.05, 65.08."

"Pendency of an appeal does not affect jurisdiction of Circuit Court to compel compliance with any of its injunctive orders as long as they are effective. CR 65.06, 65.08."

CONCLUSION

Let no one be deluded. Appellees are not anti park or conservation. Rather the opposite is our future. They envision a great growth and development of the Cumberland Falls area. They are prepared to share in that future. More and more tourists and visitors that often return require more and more accommodations, food, lodging and entertainment. The broader the field of accommodations and diversity of the visitors time creates a greater desire for more and more people to come.

All people do not desire to explore the woods and rivers alone; many prefer other top flight entertainment, such as appellees are now providing and desiring to extend.

There is no type of entertainment more appealing or popular than the top notch performers in Old Time Country Music. It draws more people than any other attraction in all this area—and it is not limited to the area in its appeal. When they come, we should be prepared to take care of them. Let's operate from the broadest base, not the narrowest. They complement each other.

In February we celebrate George Washington's birthday. His farewell address is a historic document. He warned that in the future there would be those who would want to disregard the Constitution. The Constitutional Convention in 1892

also recognized that in the future there would be those groups or individuals that would say the best way to do this is to take this from somebody and give it to me. I can do it better. Fortunately, the Bill of Rights precludes such action. See Sections 1, 2, 3, 7, 13 and 242 of the Kentucky Constitution.

Respectfully submitted,

HOMER W. RAMSEY
Whitley City, Kentucky 42653

and

J. B. JOHNSON, SR.
Williamsburg, Kentucky 40769

Attorneys for Appellees